Before the
Federal Communications Commission
Washington, D.C. 20054

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	
Cable Communications Policy Act of 1984 as	)	MB Docket No. 05-311
amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

COMMENTS OF WIDEOPENWEST FINANCE, LLC

WideOpenWest Finance, LLC ("WOW") submits these comments in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking in the captioned proceeding.[1]

INTRODUCTION AND BACKGROUND

The Commission's *Franchising Order* provides rules and guidance designed to "facilitate and expedite entry of new cable competitors into the market for the delivery of video programming, and accelerate broadband deployment consistent with our statutory responsibilities"[2] by eliminating "unreasonable barriers to entry into the cable market" and encouraging "investment in broadband facilities."[3] At bottom, the *Franchising Order* seeks to implement the "pro-competitive, deregulatory national policy framework" envisioned by the 1996

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[1] *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 (rel. March 5, 2007)(the "*Franchising Order*").

[2] *Franchising Order*, ¶1.

[3] *Franchising Order*, ¶5.

Act[4] and "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[5]

In adopting its findings, the Commission takes care to distinguish the current circumstances facing competitive entry into the video marketplace with those in existence at the time entrenched monopoly cable providers obtained their franchises. "Incumbent cable operators originally negotiated franchise agreements as a means of maintaining a monopoly position."[6] Not so with "incumbent" *competitive* providers like WOW. WOW is a terrestrial based competitive provider of cable television and other broadband-related services primarily in the Chicago, Detroit, Cleveland and Columbus (OH) markets that competes directly with Comcast in the Chicago and Detroit markets and Time Warner in the Cleveland and Columbus markets.

As a competitive provider, WOW has always been in a "fundamentally different situation" than the incumbents that operated "for years as monopolists in the video services marketplace."[7] Still, the terms of WOW's franchise agreements (and the application of related

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[4] Joint Explanatory Statement of the Committee of Conference, House of Representatives, 104th Congress, 2nd Session, Report 104-458 (January 31, 1996).

[5] 47 U.S.C. § 521(6). The Commission described its focus on creating a pro-competitive framework for telecommunications services in this way: "Section 706 states, among other things, that "the Commission… shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans… by utilizing… price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." In order to meet this requirement, the Commission has implemented a wide range of actions aimed at encouraging the growth and development of the advanced services market. More recently, we have turned our focus to establishing the appropriate comprehensive regulatory framework that will promote investment in infrastructure and increase access to advanced telecommunications capability for all Americans. In keeping with our belief that robust competition, minimal regulation, and regulatory certainty create the best environment for increased availability for advanced telecommunications capability, we have taken actions to advance these goals." *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146 (February 6, 2002)("*Advanced Services Report*"), at ¶135.

[6] *Franchising Order*, ¶26.

[7] *Franchising Order*, ¶138.

local cable ordinances) are no more favorable to WOW than the agreements of the incumbent operators against whom we compete, and in some cases our agreements are actually more burdensome. WOW's existing video franchises were negotiated in the late 1990s[8] under conditions where no meaningful legal or contractual incentives were provided to competitive entrants to the cable or broadband market, which resulted in franchise obligations that essentially mirror the incumbent agreements—including strict build out requirements, payment of fees and costs of all sorts, provision of equipment, free services and various other types of municipal funding.[9] In the context of that environment where no meaningful measures were taken to facilitate competition among operators (as contrasted with the stated purpose of the *Franchising Order* and recently enacted state franchising acts), most of the competitive new entrants to the cable services market from that time have either gone into bankruptcy or simply disappeared.[10]

If not extended to existing competitive franchises, the Commission's findings will have the ironic effect of imposing disparate treatment on similarly situated competitive providers solely premised upon when the competitive providers came to market. The Commission must recognize and address the inequities that would result if new competitive franchises are governed by the new franchising processes adopted by the Commission that were unavailable to existing competitive franchises. Our existing franchise agreements almost always contain terms and

[8] WOW purchased its systems from Ameritech New Media in 2001, and consequently "inherited" its existing franchise agreements. Before that, WOW had negotiated many other competitive franchises in Colorado and elsewhere.

[9] The Commission has in its *Franchising Order* now recognized that it is not a "reasonable expectation" that competitive providers must simply agree to the franchise terms applied to incumbent cable franchises, for the reason that the incumbent operators were negotiating their franchise agreements as a means of acquiring or maintaining a monopoly. *Franchising Order*, ¶26. Nonetheless, that was the expectation and requirement for competitive entry a few short years ago.

[10] See, e.g., *Multichannel News*, "Debt-Light, RCN Explores Sellout Options" (September 18, 2006)("Companies like WINFirst, Digital Access and WideOpenWest were attracting billions of dollars in investment in early 2000 but fell on hard times in 2001 when the bottom fell out and many overbuilders significantly scaled back ambitious expansion plans. By 2004, aside from RCN, only WideOpenWest remained."

conditions that are inconsistent with the *Franchising Order*. Legacy competitive franchises must be dealt with to properly adhere to the mandates and policy considerations of the 1996 Act. We agree with the Broadband Service Providers Association that "existing competitive franchisees should not be penalized because they were the first to risk competition with the incumbent cable operator. If a new competitor does not have the same franchise-related local costs and requirements to provide service, the higher costs faced by the original competitive BSP could result in a form of stranded investment of the very companies whose entry exemplify the goals of the 1996 Act."[11]

WOW is exactly the kind of company that Congress and the Commission intended to assist in the 1996 Act. Nevertheless, existing competitive providers such as WOW operate in a marketplace environment that imposes (a) high entry costs, and (b) considerable pricing constraints (which large incumbent monopoly providers such as Comcast and Time Warner can absorb through price adjustments in their other service areas that do not have terrestrial based competition) while possessing only a fraction of the economic resources of incumbent operators such as Comcast and Time Warner to compensate for its smaller margins. Conferring upon huge telephone companies the advantages spelled out in the *Franchising Order* and denying those same benefits to existing competitive providers would deal a severe blow to all existing competitive providers that are already struggling to compete with some of the largest, most well-funded communications companies in the country.

The Commission generally seeks comment on its tentative conclusion that its findings in the *Franchising Order* should apply to cable operators that have existing franchises, at least as

[11] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Comments of the Broadband Service Providers Association (February 13, 2006).

"they negotiate renewals" of their agreements with LFAs. For competitive providers like WOW, extending the findings solely to "renewals" will have the ironic effect of consigning existing competitive operators to operate in a franchise environment that is substantially more burdensome than that of new competitive entrants due to the disparity between government sanctioned franchising terms. The Commission should extend its findings to all *competitive* franchises, so that competitive providers like WOW are not placed at a competitive regulatory disadvantage to phone companies that enter into new franchise agreements. Without such an extension, the Commission will in effect be burdening and, therefore, diminishing competition from existing competitive providers while promoting a much more favorable regulatory environment for new competitive entrants.

DISCUSSION

A. Much of the Franchising Order Confirms Existing Law and Consequently Applies to all Cable Operators and Franchising Authorities.

The *Franchising Order* states that "this proceeding is limited to competitive applicants under Section 621(a)(1)." Still, much of the discussion in the *Order* is of existing law that is not just "germane", but clearly applicable to all existing franchises. In this connection, the *Order* properly concludes that local laws, regulation and agreements are "preempted to the extent they conflict with this *Order* and the rules adopted herein,"[12] but declined at this time to extend the *Order* to state franchise laws until it develops a more "sufficient record."

1. The Franchise Fee Findings Should Apply to All Cable Operators and Franchising Authorities

Although addressed in the context of practices that may impede competitive cable entry, the Commission's discussion of "Franchises Fees" represents an affirmation of existing federal law that is far too often ignored by local franchising authorities. The Commission should confirm that the portions of its discussion relating to the 5% franchise fee cap apply to all cable operators, whether incumbent or new entrants, and all franchising authorities, whether local or state. Many LFAs require that cable operators pay PEG support and other fees and costs, provide equipment, free services and various other types of municipal funding and support, all over and above the 5% franchise fee cap.[13] It is absolutely routine for LFAs to impose these

[12] *Franchising Order*, ¶137.

[13] For example, Huntington Woods, Michigan (a WOW franchise that is very similar to many other WOW franchises) requires, in addition to 5% franchise fees, quarterly payments of 1% of Gross Revenues in "Financial Support for PEG Channels." (Franchise, Section 5.3). In addition, our franchise agreement requires that we, among other things, provide: free service to a whole host of municipal and school buildings (Section 2.12); free joint use of facilities (Sections 3.29 and 14.17.5); construction of a fiber backbone and lease back to the City for the sum of $1.00 (Section 5.2); payment of $20,000 for attorney and consultant fees (Section 7.2); payment of $6,000 for an application fee (Section 7.3); and payment of costs incurred to transfer the franchise (Section 10.4).

types of fees on existing competitive providers. The Commission should clarify that it is no more permissible for LFAs to impose these fees and requirements that violate the 5% cap on incumbent operators, as it would be to demand such requirements from new entrants.

2. State Franchise Laws Should Also Comply with the Minimum Standards Established by the Franchising Order

The Commission has declined to extend its findings to state franchise laws, which "may need to be evaluated by different criteria than those applied to the demands of local franchising authorities."[14] We see no logical or legal basis for interpreting federal law one way with respect to local franchise laws and agreements, and another way for state franchise laws. The Congressional and Commission goals of enhanced cable competition and accelerated broadband deployment are the same, regardless of whether the franchising authority is local or state. A burdensome, unreasonable state franchising process is just as harmful to cable competition, if not more so, than the process used by any one isolated LFA. In all events, however, state franchising laws that establish franchising processes designed to foster cable competition must be extended to existing competitive cable providers, so as maintain regulatory parity among competitive providers.

The City of Chicago (Area 5) requires that WOW: (i) pay 5% franchise fees ($3 million prepaid); (ii) pay $25,000/yr (Local Origination Programming); (iii) pay $100,000 (yr 3), $100,000 (yr 4), $100,000 (yr 5), and $100,000 (yr 6) (PEG Capital Costs); (iv) pay $215,000/yr (funding for Chicago Access Corporation); on request, pay $10,000/yr (municipal utilization); (v) pay for other equipment (modulators and other equipment to permit use of CAC channels); (vi) provide free service outlets to government buildings; (vii) provide one full time employee; (viii) pay $50,000 equipment set aside funds on request; and (ix) within 90 days, pay 20% of replacement value of old production equipment.

[14] *Franchising Order*, ¶1, footnote 2.

B. <u>The Other Parts of the Franchising Order Applicable Only to Competitive "Applicants" Should be Extended to Existing Competitive Franchises</u>

Certain of the Commission's decisions in the *Franchising Order* have been thus far made applicable only to new competitive applicants, and then only with respect to local franchise laws and agreements. As a practical matter, those provisions will benefit primarily phone companies that are now entering the video marketplace. The Commission has also tentatively concluded to extend the findings to incumbent cable operators at the time they renew their franchises. There are two important problems with limiting the application of the *Franchising Order* to new entrants (and perhaps others at the time of renewal): first, WOW is already subject to competitive franchise agreements and local laws that impose upon it obligations wholly inconsistent with the findings of the *Franchising Order*; and second, WOW must compete not only with Comcast and Time Warner, but also the phone companies that are now entering the marketplace as a third wireline competitor. WOW must not be placed in a position where the huge, well-funded phone companies enter the market on terms that place WOW at a further competitive disadvantage. In order to ensure competitive neutrality, the *Franchising Order* must be extended to existing competitive franchises. WOW is particularly concerned that relief from the build out and PEG/I-Net requirements are only available to *new* competitors and not existing competitive providers.

1. <u>The Commission Generally has Authority to Extend its Findings to Existing Competitive Franchises</u>

The Commission has the authority to extend its findings to all existing competitive operators. In the *Franchising Order*, the Commission observed that it possesses broad authority to "prescribe rules and regulations as may be necessary in the public interest to carry out provisions of this Act"[15] and "perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition."[16] Extending the findings to existing competitive franchises will preserve and promote competition, which is undoubtedly in the public interest and consistent with the objectives of Congress.

2. <u>The Findings Regarding PEG/Institutional Networks Must be Extended to Existing Competitive Franchises</u>

The Commission concludes that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net, but again limited its finding to competitive applicants under Section 621(a)(1). The Commission found that it has the authority to interpret what Congress meant in Section 621(a)(4)(b) by "adequate PEG access channel capacity, facilities, and financial support" and to prohibit excessive LFA demands in this area.[17] In particular, the Commission found it "unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations," with the Commission advocating a *pro rata* cost sharing approach as a reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities.[18]

The Commission asked for further comment on its findings relative to the PEG/I-Net issue, as this issue is also germane to existing franchises. In that regard, the Commission should extend its rationale relative to "adequate" PEG support to find that a demand or requirement by an LFA (be it through an existing franchise agreement or local ordinance) that an *existing*

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[15] *Franchising Order*, ¶54.

[16] *Franchising Order*, ¶64.

[17] *Franchising Order*, ¶112.

[18] *Franchising Order*, ¶120.

competitive provider provide PEG and I-Net benefits that exceed the incumbent operator's obligations are prohibitively "excessive" and, therefore, in violation of Section 621(a)(4)(b).

Our franchise relationship with the City of Maple Heights, Ohio illustrates why it is imperative that the Commission's rules to extend to existing competitive franchises. We have been operating in the City of Maple Heights, Ohio for seven years, without a customer complaint. After a change in ownership that occurred last year, the City of Maple Heights at the urging of its new lawyers determined that WOW should be subject to a whole host of cable ordinance obligations (in addition to its negotiated franchise obligations), some of which the City does not and will not apply to WOW's competition, Time Warner. In a City where we have 1200 customers and a penetration rate for customers served by terrestrial-based providers of approximately 12% (Time Warner has 88% of such customers), the City is currently demanding the following of WOW *as a condition to providing ongoing competitive cable services*:

- In addition to the 5% franchise fee, an initial PEG Access Support payment of $20,000, and ongoing "PEG Access Support" fees equal to .35% of Gross Revenues;
- Character generators (estimated value $5,000 each) for each of three PEG channels, along with current claims that we must also purchase additional modulation equipment. The City's representatives most recently proposed that because the City has no need for the equipment we instead pay the City cash (in the amount of $40,000) to discharge these obligations;[19]

[19] The Commission's related finding that: "it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose" (*Franchising Order*, ¶ 119) should be extended to existing competitive franchises, and to circumstances like this where a City demands that an operator pay cash for equipment that the City does not need.

- Various application fees and legal costs[20] along with the provision of free service to a whole host of municipal and school buildings and free video arraignment services; and
- Construction of an I-Net, *with no contribution from the long time dominant incumbent operator Time Warner*.

In sum, the City requires that WOW, over and above the 5% franchise fee cap: (i) pay an ongoing .35% PEG Support Fee (a fee not paid by Time Warner), after WOW already paid an initial $20,000 support fee; (ii) pay the City's legal costs and application fees (in amounts more than it requires from Time Warner); (iii) provide it free services; (iv) pay it $40,000 cash in lieu of equipment it does not need; and (v) construct for the City an I-Net, with no contribution whatsoever from the dominant incumbent operator.

It is an unfortunate reality that competitive operators need protection from cities like Maple Heights, Ohio. But, we do. Actions of LFAs like Maple Heights threaten our ability to continue to provide competitive service. Moreover, if the *Franchising Order* is not extended to existing competitive franchises, competitive providers like WOW will be placed at a severe competitive disadvantage relative to new entrants that must be treated fairly by virtue of the Commission's *Franchising Order*.

3. <u>The Findings Regarding Build-out Requirements Must Also Be Extended to Existing Competitive Franchises.</u>

In 2001, WOW purchased the cable systems built by Ameritech New Media. With some exceptions, the systems were already built. Our existing franchises (that we inherited from Ameritech New Media) generally require that we build the entire community within a stated time

[20] For example, a $5,000 transfer application fee (Section 16.3) and, for WOW only, another $5,000 for legal fees (Ordinance); a $2,000 application fee (Section 5.2); and a $3,000 legal expense fee (Section 5.3).

frame, and then extend our system as the community grows-- just like the incumbent operators against whom we compete. Although we purchased essentially "built" competitive cable systems, we are subject to system extension and build requirements that often make no economic sense. Still, some LFAs insist that we continue to build in those areas, regardless of the adverse financial impact upon us.

All of these statements in the *Franchising Order* in support of eliminating unreasonable build out requirements are true for WOW:

- "Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable operators were frequently awarded community-wide monopolies."[21] The incumbent cable operators against whom WOW competes had decades of monopoly franchises for terrestrial video services. In this environment, the incumbent cable operators have been able to extend their networks into low-density service areas using cash flow from operations. The economic decision to build in a low-density area could be based on the assumption that the incumbent would be the only provider of an equivalent cable video service. This monopoly position and available funding allowed incumbents economically to extend into many areas that they would have chosen to ignore if they had faced a competitor that could have potentially split the market. In many cases, the incumbent cable operator also had the ability to stop the network extension when it would not produce an economic return. WOW has not experienced one day of "monopoly" service. We are a competitive provider of the sort envisioned by Congress and the Commission in 1996.

[21] *Franchising Order*, ¶87.

- New "cable entrants must compete with entrenched cable operators and other video service providers."[22] WOW competes with Comcast and Time Warner, the two largest cable operators in the country.
- A competing cable operator "cannot expect to capture more than a fraction of the market. Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market."[23]. WOW has an average penetration of about 25%, compared to 60% and more for its competitors (Comcast and Time Warner).

In light of the above, the rules adopted by the Commission in the *Franchising Order* should clearly extend to competitive providers such as WOW so as to (a) assure that there will be parity with telephone companies entering our service areas, and (b) not unintentionally materially impede the development of existing competitive cable operators.

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[22] *Franchising Order*, ¶88.

[23] *Franchising Order*, ¶88.

CONCLUSION

As an existing competitive provider, WOW requests that the Commission extend its findings in the *Franchising Order* to all existing *competitive* franchises.

Respectfully submitted,

WIDEOPENWEST FINANCE, LLC

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